IN THE

Supreme Court of the United States

October Term, 1940
No. 652

FARMERS UNDERWRITERS ASSOCIATION,

Petitioner,

vs.

SCOTT CARTER, as Administrator of the Estate of John P. Carter, Deceased.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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SCOTT CARTER, as Administrator of the Estate of John P. Carter, Deceased.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The petitioner, Farmers Underwriters Association, a corporation, by its attorney, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on October 28, 1940, reversing the decision of the District Court of the United States for the Southern District of California, Central Division.

Opinions Below.

The opinion of the District Court [R. 36-40] is unreported. The opinion of the Circuit Court of Appeals [R. 58-64] is reported ..... F. (2d) ..... The judgment of the Circuit Court of Appeals was entered on October 28, 1940. [R. 65.] The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether a letter written by the Acting Deputy Commissioner of Internal Revenue to the petitioner five days *prior* to the date on which the Commissioner signed the rejection schedule on which taxpayer's claim for refund was scheduled is the "notice of the disallowance" required by Section 3226 of the Revised Statutes, as amended by Section 1103(a) of the Revenue Act of 1932.

Statutes Involved.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 1103. LIMITATIONS ON SUITS BY TAXPAYERS.

(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that

time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. * * * (U. S. C., Title 26, Sec. 1672.)

Statement.

Petitioner overpaid its capital stock taxes for the year ended June 30, 1933 in the amount of $480.00, and filed an adequate and timely claim for refund thereof. So much the Government concedes.

On February 28, 1934, the Commissioner of Internal Revenue signed rejection schedule Number ST–Rej. 3399, on which petitioner's claim for refund, filed September 29, 1933, was listed. [R. 17-18.] The *only* letter or "notice" mailed by the Commissioner to the petitioner *subsequent* to his signing of the disallowance schedule was dated May 5, 1934. [R. 18.] This action was commenced April 30, 1936, and the District Court held that it was timely because begun within "two years from the date of mailing by registered mail by the Commissioner of a notice of the disallowance * * * of the claim to which such suit or proceeding relates."

The Circuit Court of Appeals held that when the Commissioner signed the disallowance schedule on February 28, 1934, he did a superfluous act [R. 63]; that the petitioner's claim had been rejected or disallowed on February 23, 1934; and that a letter written that day was the "notice of the disallowance" required by the applicable statute.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that a "notice of the disallowance" may be given *before* the act of disallowance—the signing by the Commissioner of the rejection schedule—has occurred.

2. In holding that the action was not seasonably filed.

Reasons for Granting the Writ.

1. The question involved is one of importance in the administration of the revenue laws and has not been, but should be, settled by this Court. Its importance is perhaps best illustrated by the attitude taken by the Department of Justice in the case at bar. By stipulation, the printing of the record in the Circuit Court of Appeals was deferred pending decision of this Court in *Haggar Co. v. Helvering,* 308 U. S. 389. That decision, rendered January 2, 1940, showed that petitioner had overpaid its tax and that the Commissioner had erred in disallowing petitioner's claim for refund. As the opinion of the District Court was not reported, it could hardly have been embarrassing to the Government as a precedent, and as the overpayment was only $480.00, the Government must have considered the principle involved an important one—otherwise it would hardly have been justified in burdening the Circuit Court of Appeals with the prosecution of its appeal. If important to the Government prior to the decision of the Circuit Court of Appeals, the principle can hardly be less important now.

2. The decision below conflicts in principle with decisions of this Court as to what constitutes a "disallowance" of a claim for refund; see *United States v. Michel,* 282 U. S. 656 (1931), and *U. S. v. Henry Prentiss & Co.,* 288 U. S. 73, in the latter of which this Court said (p. 83):

> * * * The Commissioner rejected the claim on September 3, 1926, *by signing* the rejection schedule. * * *[*]

The decision below is likewise in conflict with the decision of the Court of Claims in *Savannah Bank & Trust Co. v. U. S.,* 58 F. (2d) 1068, 1070.

Argument.

Prior to the amendment made by Section 1103(a) of the Revenue Act of 1932, the period of limitation for bringing suit began with the *act* of disallowance of a claim for refund; giving of *notice* of disallowance was not material. *U. S. v. Michel,* 282 U. S. 656 (1931). This Court said, under the prior statute, that "disallowance" occurs when the Commissioner signs the rejection schedule. *U. S. v. Henry Prentiss & Co.,* 288 U. S. 73 (1931). The Court of Claims, in *Savannah Bank & Trust Co. v. U. S.,* 58 F. (2d) 1068, in holding that a suit was timely, said (p. 1070):

> * * * If it is shown that the Commissioner signed a schedule of rejection, the date on which such schedule is approved must be taken as the date of disallowance. * * *

---

*Italics supplied wherever they appear.

There was apparently a time—prior to 1932—when it was not the invariable practice for the Commissioner to disallow a claim for refund by signing a rejection schedule. But sometime prior to enactment of the Revenue Act of 1932, here material, the Commissioner did establish the regular practice of signing a rejection schedule "in *every* case." This is shown by a statement in the *Savannah Bank* case, *supra,* decided May 31, 1932, as follows (p. 1070):

> * * * It appears that it was not the practice of the Commissioner of Internal Revenue until recently to sign an official schedule of rejection in every case in which a claim had been filed. * * *

In adopting the 1932 amendment to Section 3226 of the Revised Statutes, applicable here, Congress obviously was changing the rule as expounded in the *Michel* case, *supra.* Congress desired taxpayers to be advised by registered mail of the "disallowance", and clearly provided that the two-year period for bringing suit should not commence to run until (1) a claim had been "disallowed" and (2) the Commissioner had mailed notice of such disallowance. Now, in view of the uniform rule of the decisions under the prior statute, that "disallowance" occurred when the Commissioner signed the rejection schedule, Congress must have used the word in that sense in the 1932 amendment, especially since the Commissioner had theretofore established the regular practice of signing a rejection schedule *in every case.* Thus Congress clearly contemplated and intended that *after* the Commissioner had disallowed a claim by signing a rejection schedule, he would mail notice thereof; in the very nature of things human, one cannot give notice that an

act has occurred until after it has been done. That this was the construction given by the Treasury to the 1932 amendment immediately after its enactment, is shown by the language of the multigraphed form (213M) which it uses for giving the statutory notice [but which the record shows was not used in the case at bar, R. 18]—a form which counsel for petitioner has been advised by the Bureau was first adopted June 9, 1932, three days after the approval of the Revenue Act of 1932. Counsel herein has observed in his practice that Form 213M has been used by the Treasury in numerous instances within his knowledge; indeed, except for the case at bar, he knows of no case where the Treasury failed to use it. In the case of another client of counsel, Form 213M was mailed by the Treasury on July 13, 1937, and the entire body of the form, with date and schedule number inserted thereon by typewriter, reads as follows:

> Reference is made to Bureau letter dated June 21, 1937, wherein you were informed that the claim for refund indicated above would be disallowed. The letter also stated the reasons for the proposed disallowance.
>
> The claim having been disallowed or rejected on Schedule numbered 23450 , this notice of disallowance is sent to you by registered mail as required by Section 1103 (a) of the Revenue Act of 1932.

The precise language, "*having been* disallowed or rejected on Schedule numbered 23450," shows that the Treasury construed the 1932 amendment as requiring it to disallow first—by signing a rejection schedule—and to mail notice of disallowance *later*. A subordinate official may well have concluded, on February 23, 1934, that petitioner's

claim should be rejected, but as the Commissioner did not sign the rejection schedule until February 28, 1934, "the matter was still *in fieri*"* and could have been recalled on, for example, February 27, 1934. Until February 28, 1934, therefore, the claim was not "disallowed" and there was no final action as to which the statutory "notice" could be given.

If, as the Government contends, petitioner's claim was disallowed on February 23, 1934, and the letter of that date is the notice required by the statute, why did the Commissioner sign Schedule Number ST–Rej. 3399, on February 28, 1934? [R. 17-18.] Why was a notation made on the claim for refund reading as follows: "St–Rej. 3399, Feb. 28, 1934"? [R. 25.]

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOSEPH D. BRADY,
Attorney for Petitioner,

433 South Spring Street,
Los Angeles, California.

December, 1940.

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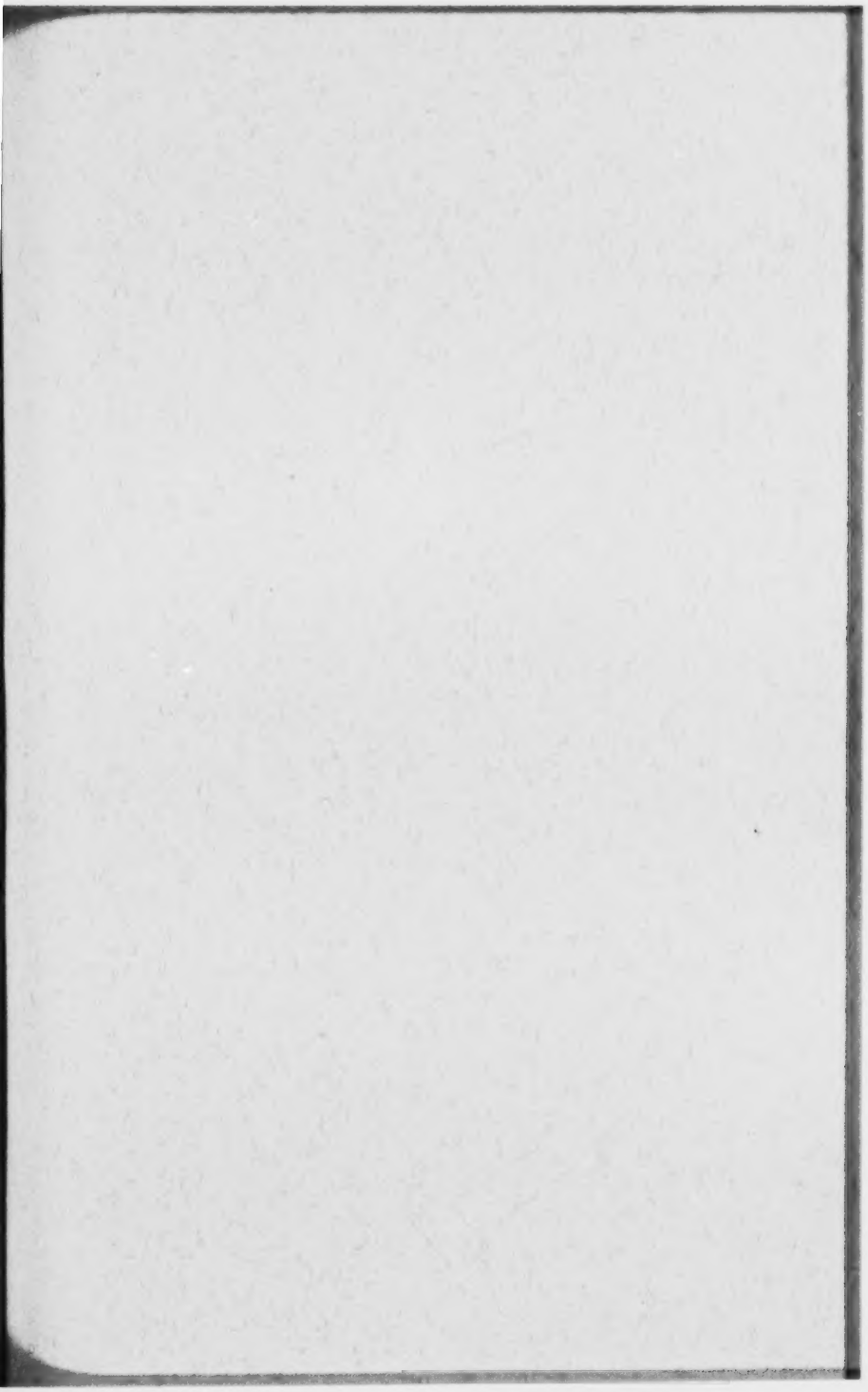
*Mr. Justice Cardozo in *U. S. v. Memphis Cotton Oil Co.*, 288 U. S. 62.



Due service of the within Petition is hereby acknowledged this.....day of December, A. D. 1940.

_____

_____

Attorneys for Respondent.

12-19-40—50

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In the Supreme Court of the United States

OCTOBER TERM, 1940

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FARMERS UNDERWRITERS ASSOCIATION, PETITIONER

v.

SCOTT CARTER, AS ADMINISTRATOR OF THE ESTATE OF JOHN P. CARTER, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court did not deliver any opinion in this case, but its special findings of fact and conclusions of law may be found in the record (pp. 38–41). The opinion of the Circuit Court of Appeals (R. 58–64) is reported in 115 F. (2d) 302.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 28, 1940. (R. 65.) The petition for writ of certiorari was filed December 26,

1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Commissioner's registered letter mailed to the taxpayer before the schedule of rejection was signed, advising that its claim for refund was rejected, was a notice of disallowance of its claim for refund which initiated the running of the two-year period of limitation for suit provided by Section 3226 of the Revised Statutes, as amended by Section 1103 of the Revenue Act of 1932.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra*, pp. 7–8.

STATEMENT

On September 29, 1933, the taxpayer filed with the Collector of Internal Revenue at Los Angeles, its claim for refund of capital stock taxes, in the sum of $480. (R. 22–24.)

On February 23, 1934, Guy T. Helvering, Commissioner, by Adelbert Christy, Acting Deputy Commissioner, mailed by registered mail to the taxpayer a letter dated February 23, 1934 (R. 27–28), which was received by it at Los Angeles, California, on February 27, 1934 (R. 17). This letter advised the taxpayer in no uncertain terms that its claim was rejected. (R. 28, 64.)

On February 28, 1934, the taxpayer mailed to the Commissioner a letter dated the same day, and signed by T. E. Leavey, as Vice President (R. 17), which acknowledged receipt of the notice that its claim for refund had been rejected (R. 29). The letter requested that the matter be referred to the General Counsel of the Bureau for his consideration and that the claim be reopened and allowed. (R. 33.)

On February 28, 1934, the Commissioner of Internal Revenue signed rejection schedule Number ST–Rej. 3399, on which the taxpayer's claim for refund, dated September 29, 1933, was listed. (R. 17–18.)

On May 5, 1934, Adelbert Christy, Acting Deputy Commissioner, mailed to the taxpayer a letter, dated on that date (R. 18), which stated that the Bureau's letter of February 23, 1934, had rejected the taxpayer's claim (R. 34), and declined the taxpayer's request that the matter be referred to the General Counsel of the Bureau because the question of rejection had been decided (R. 35–36). Suit to recover the tax was instituted on April 30, 1936 (R. 10, 62), more than two years after the Commissioner's first letter to the taxpayer, dated February 23, 1934, and more than two years from February 28, 1934, the date on which the Commissioner signed the rejection schedule upon which the taxpayer's claim for refund was listed (R. 17–18).

The trial court determined that no notice of disallowance of taxpayer's refund claim was mailed by the Commissioner to the taxpayer until May 5, 1934. It concluded that the letter of February 23, 1934, did not constitute a notice of disallowance, and that the action was not barred by Section 3226 of the Revised Statutes as amended. (R. 39.)

On appeal the Circuit Court of Appeals held that the letter dated February 23, 1934, advised the taxpayer in no uncertain terms that its claim was rejected, and that the letter fulfilled the requirements of the statute. The Circuit Court of Appeals reversed and remanded the case with instructions to dismiss the complaint. (R. 64.)

ARGUMENT

The statutory provisions here involved were enacted for the first time in 1932 when Congress by Section 1103 (a) of the Revenue Act of 1932, see Appendix, p. 7, *infra*, amended Section 3226 of the Revised Statutes. Those amendatory provisions forbid the bringing of a suit for refund "after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance" of the claim for refund.

The registered letter notifying petitioner of disallowance was mailed on February 23, 1934, and this suit was instituted on April 30, 1936, more than two years thereafter. Accordingly, the court below correctly decided that this suit was barred.

The petitioner contends, however, that the two-year period could not begin to run until the Commissioner had signed a "rejection schedule" and mailed notice *thereafter* to petitioner. And since the disallowance was not entered upon the rejection schedule until February 28, 1934, petitioner urges that the February 23, 1934, letter was ineffective to start the running of the period of limitations.

As noted by the court below (R. 63) there is no requirement whatever that the Commissioner sign a rejection schedule, and there is no statutory provision to the effect that the disallowance of a claim must be evidenced by an entry upon such a schedule.

Indeed, prior to the 1932 amendment, the statute had simply provided that the two-year period should run from the date of "disallowance." And since considerable uncertainty often arose as to just what was the date of "disallowance," the 1932 provisions were enacted for the express purpose of avoiding such confusion. See S. Rep. No. 665, 72d Cong., 1st Sess., p. 57.

The court below concluded (R. 64) that the letter dated February 23, 1934, fulfilled the requirements of the statute. That letter was sent by registered mail and stated specifically that the claim was rejected. That it was understood by both the taxpayer and the Commissioner to have constituted a rejection of the claim is shown by the taxpayer's letter of February 28, 1934, referring to the rejection of its claim (R. 29) and asking that it be re-

opened (R. 33), and the Commissioner's letter of May 5, 1934 (R. 34), in reply thereto.

The cases relied upon by petitioner (Pet. 5) as presenting a conflict all arose under statutory provisions prior to the 1932 amendment. At that time it was necessary to adopt some practical solution as to the determination of the date of disallowance under the earlier provisions. Accordingly, in those cases in which the Commissioner signed a rejection schedule the date of his signature was adopted. Under the new statute there is no occasion to refer to any rejection schedule or any other possible starting point for the running of the two-year period under the earlier statute; the time from which the statute runs is the mailing of the notice of disallowance.

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions and no question of general importance is presented. The petition for writ of certiorari should, therefore, be denied.

Respectfully submitted.

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Solicitor General.

SAMUEL O. CLARK, JR.,
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SEWALL KEY,
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ANDERSON PAGE,
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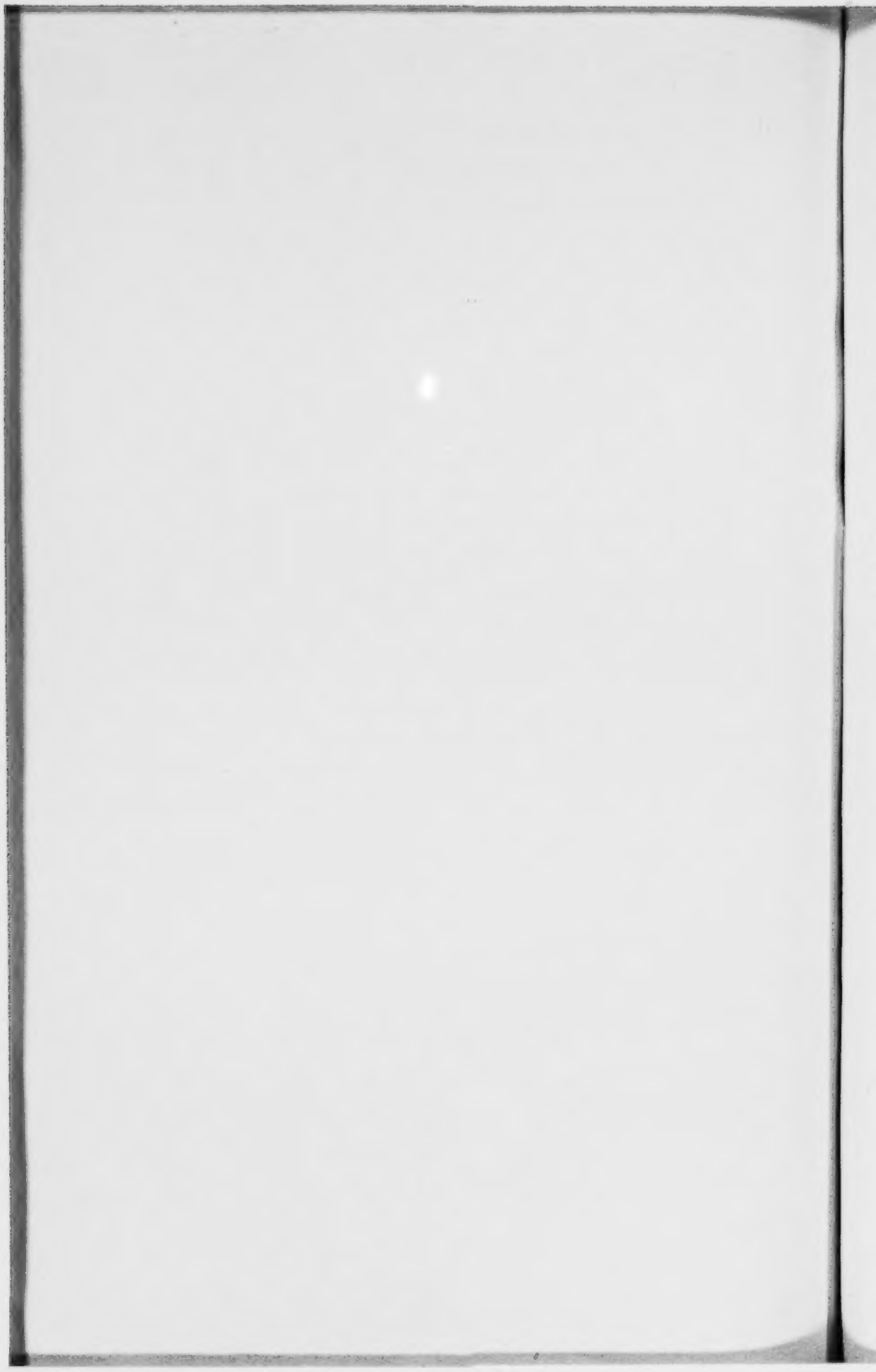
JANUARY 1941.



APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 1103. LIMITATIONS ON SUITS BY TAXPAYERS.

(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."

* * * * *

[U. S. C., Title 26, Sec. 1672.]

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail." [U. S. C., Title 26, Sec. 1672.]

(b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924 [i. e., June 2, 1924.]

U. S. GOVERNMENT PRINTING OFFICE: 1941